

From: Marc S Weintraub
To: Microsoft ATR
Date: 1/26/02 2:35am
Subject: Microsoft Settlement

Dear Sir or Madam,

In accord with the Tunney Act, I am submitting my comments on the Proposed Final Judgement in the Microsoft proceedings (commonly known by the somewhat inaccurate description: "DOJ vs Microsoft").

There are many reasons why I find fault with the proposed settlement. In order to keep this comment brief, I will focus my comments on one specific area that I believe has not received a great deal of commentary from the public.

I am very concerned about the faulty definitions contained within the Proposed Final Judgement (PFJ) and their implications. There are numerous examples of alterations to definitions found in the Findings of Fact (FOF) as they have been "reproduced" in the PFJ. For example:

Definition A - "API"

The FOF defines "API" as "the interfaced between application programs and the operating system."

The PFJ has altered it to mean only "the interfaces between Microsoft "Middleware" and Microsoft Windows, excluding Windows APIs used by other application programs." The PFJ's definition of API permits Microsoft to omit important APIs that are crucial to Independent Software Vendors' (ISV's) ability to develop software that integrates with Windows to the same extent to which competing Microsoft products are able to do so.

Definition J - "Microsoft Middleware"

The FOF defines "middleware" as "application software that itself presents a set of APIs which allow users to write new applications without reference to the underlying operating system."

The PFJ destroys the intent and spirit of that definition by making it possible for Microsoft to avoid compliance simply by altering the form of version enumeration or the method of distribution of the products it miserly lists as "middleware." The PFJ leaves so many holes open to Microsoft as to make the concept of "middleware" a moot point in terms of measuring Microsoft's adherence to the PFJ's remedies. That is simply wrong and must not be permitted.

Definition K - "Microsoft Middleware Product"

The PFJ restricts the list of products to Internet Explorer, Microsoft Java, Windows Media Player, Windows Messenger and Outlook Express. It

deliberately omits the obvious selections of Microsoft .NET, C# , Outlook and Office. There are, no doubt, other products that fit the proper definition of "middleware" and should be included as well. In fact, ideally, there should not be a list of what DOES apply, rather there should be a list of what DOES NOT. The fact is that no one at Microsoft is going to willingly include every product that should be a member of the list unless forced to do so. By changing the rules of defining the term "middleware" such that everything is included except that which is explicitly excluded, Microsoft will be forced to realistically explain the VALID reasons why any product should be added to the exclusion list. Only then can there be a reasonable expectation that essential APIs MIGHT become available to ISVs.

Definition U - "Windows Operating System Product"

The PFJ makes unreasonable assumptions about what constitutes a Windows Operating System product. It specifically restricts the definition to "only Windows 2000 Professional, Windows XP Home, Windows XP Professional and their successors." What about existing Windows products such as Windows CE? What about the XBox which Microsoft clearly states runs an embedded version of Windows XP? Does "embedded" mean it is not "Home" and it is not "Professional" and therefore it "does not count?" What about the Tablet PC featuring Windows XP Tabled PC Edition? I do not see the words "Home" or "Professional" in that name, does it count? I am certain that my and the ISV industry's answer to each "does it count" question is a resounding YES, however I am equally certain that Microsoft's is a resounding NO.

As the PFJ definition currently reads, Microsoft can evade the provisions of the Final Judgment by shifting its efforts away from the Operating Systems listed in Definition U and towards Windows XP Tablet Edition, Windows CE, Pocket PC, X-Box or some other Microsoft Operating System that can execute Windows applications. That is simply wrong and must not be permitted.

True competition cannot be ensured due to the faulty definitions included in the PFJ. The unwarranted restrictions and syntactic gymnastics employed ensure that Microsoft can evade the purpose behind the action taken by the DOJ and several State's AGs. The purpose should be clear to everyone, it includes (but is not limited to):

- * erasing the barriers to entry onto the competitive field by ISVs
- * promoting positive and unfettered competition
- * ensuring that Microsoft ceases and desists from its anti-competitive practices
- * preventing Microsoft from obtaining and abusing future monopolistic powers

The proceedings surrounding this case have far reaching implications to the future of Microsoft and the Computer Information Industry. If the barriers

to true competition are not eliminated now, they probably never will be. This is a momentous time given the indisputable fact that a US Court has judged (for the first time ever) Microsoft to have used and abused Monopolistic powers and to have actively engaged in a systematic process of preventing and obliterating competition in key sectors of the Computer Information Industry.

If the DOJ permits Microsoft to escape with a slight slap on the wrist and a Settlement that is, for all intents and purposes, unenforceable by virtue of the highway-sized loopholes it gives Microsoft then I must ask you "why do we have a DOJ? What service does it provide to the people of the United States of America that cannot be better served by the Private Sector and the States' AGs?"

I believe the DOJ serves the people of our nation well, with dignity and honor 99% of the time. I am gravely concerned that the Microsoft Settlement falls under the 1%.

Thank you for your time and attention to this very important matter. Some say this case will make history. I say it already has and will continue to do so for decades to come. We are at a crossroads. We will either have a 900 pound Monopoly Gorilla or we will have the competition that has been the ideal and hallmark of the American Free Trade system. We, the American people, are relying upon you to do what is right and we have faith in your ability and determination to do so.

/s/ Marc S. Weintraub
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